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Nos. 91-543; 91-558; and 91-563

In The

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER THE COUNTY OF ALLEGANY

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I.

THE ACT IS AN UNCONSTITUTIONAL MANDATE TO THE STATES.

A. *The Act's direction that each state "shall be responsible" is a mandate and not a mere policy statement.*

The Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021b *et seq.* (the "Act"), mandates that each state is responsible for the disposal of low-level radioactive waste generated in the state. While the states have three options as to how to carry out this federally imposed obligation, the states *must* exercise the sovereign powers reserved to them pursuant to the Tenth Amendment. Such a direct mandate to the states by the national government to carry out a federal policy is unprecedented, beyond the enumerated powers of Congress and contrary to the status of the states as established by, *inter alia*, the Tenth Amendment and the Guarantee Clause. Allegany County Br. 9-19.

Respondents, Intervenors and various supporting *Amici* argue that the Act's language that each state "shall be responsible" for disposal of low-level radioactive waste is a mere statement of policy. United States of America, *et al.* (hereinafter "Respondents") Br. 10-15; State of Washington *et al.* (hereinafter "Intervenors") Br.7-8; Rocky Mountain Low-Level Radioactive Waste Compact *et al.* (hereinafter "Compacts") Br. 18-21; AFL-CIO Br. 14-16; American College of Nuclear Physicians *et al.* (hereinafter "Generators") Br. 6-9; U.S. Ecology, Inc. Br. 17-18. Respondents, Intervenors and their *Amici* argue that the Act is within the constitutional power of Congress to provide "incentives" to the states to carry out congressional policy. Congress is portrayed as merely acting as an "umpire" or "referee" to help the states to carry out

a prior agreement. *See* Respondents Br. 28; Intervenors Br. 24, 25; Compacts Br. 1,9.

Respondents, Intervenors and their *Amici* are wrong. The Act, read as a whole, is a directive by the national government that each state provide for the disposal of low-level radioactive waste. The states can either (i) develop alone, or in agreement with other states, a disposal facility, (ii) take title and possession to the waste, or (iii) pay all damages resulting from a failure to take title or possession of the waste. The states, however, are always "responsible."

When Congress wished merely to make a statement of policy in the Low-Level Radioactive Waste Policy Act of 1980, P.L. 96-573, 94 Stat. 3348 ("1980 Act") it did so explicitly by declaring that it was the "policy of the Federal Government that ... each State is responsible for providing for the availability of capacity either within or without the State for the disposal of low-level radioactive waste generated within its borders". Yet, the plain language of the Act, passed in 1985, contains an express mandate to the states: "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste". 42 U.S.C. §2021c(a)(1). Congressional supporters of the Act acknowledged its mandatory nature. *See* 131 Cong. Rec. S. 18,104; S. 18,113 (daily ed. December 19, 1985) (statements by Senators Hart and Johnston).

B. *Congressional power cannot be expanded by "consent".*

Respondents, Intervenors and their *Amici* argue that even if the Act is viewed as a mandate to the states, the legislative power of Congress can be expanded based upon consent of the states. *See* Respondents Br. 33; 37-38; Intervenors Br. 17-19; Compacts Br. 23-27.

The Constitution grants Congress only enumerated legislative powers. Laurence H. Tribe, *American Constitutional Law* §5-2 at 298 (2d ed. 1988); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 945 (1983). The Framers considered and rejected grants of broader legislative powers. The Framers twice considered giving Congress the power "to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." Laurence H. Tribe, *American Constitutional Law*, §5-2 at 298 n.1 (2d ed. 1988) (quoting 1 M. Farrand, *Records of the Federal Convention of 1787*, 53 [1911]). Instead, the Framers only granted Congress the legislative powers enumerated in Article I, §8. Therefore, an act of Congress is invalid unless authorized by the Constitution even if the states have been ineffective in dealing with the problem addressed by the act. *See Id.; Kansas v. Colorado*, 206 U.S. 46, 89-92 (1907).

The alleged "consent" of the states does not operate to expand Congressional power beyond the enumeration of the Constitution.[1] In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983), this Court held "[t]he hydraulic pressure inherent in each of the separate Branches to exceed the outer lim-

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[1] Respondents, Intervenors and their *Amici* argue that all of the states consented to the Act by the National Governors' Association's ("NGA") promotion of a program giving the states the *primary* responsibility for siting low-level radioactive waste facilities. Respondents Br. 8-9;28; Intervenors Br. 6-7; Compacts Br. 7-8; AFL-CIO Br. 13-14; U.S. Ecology, Inc. Br. 4-6. However, the promotion by a lobbying group, even the NGA, of a program does not constitute consent by the states as sovereigns. The states never entered into a written agreement, approved by the various states' legislatures, which was then submitted as a compact for approval to the Congress pursuant to Article I, §10, cl. 3. As this Court has noted, a compact between states, although approved by Congress, remains a legal document that must be construed and applied in accordance with its terms. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Since the states as sovereign entities never entered into any written contract or "legal document", they [illegible] not be bound. Moreover, the "take title" provision was not part of the program submitted by the NGA.

its of its power, even to accomplish desirable objectives, must be resisted". *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 565 (Powell, J., dissenting) (the "hydraulic pressure" to exceed the constitutional limits of power may operate "when Congress seeks to invoke its powers under the Commerce Clause . . ."). In *Chadha*, this Court struck down the enactment of a one-house legislative veto with respect to decisions to allow certain aliens to remain in the United States. This provision was declared unconstitutional even though both Houses of Congress and the President consented by enacting and signing the law. As this Court noted:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President [citation omitted]. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 959 (1983).

Since "political" consent by other affected branches of the national government is insufficient to expand the power of another branch, the alleged consent of the states to the Act is insufficient to expand the powers of Congress beyond those enumerated in the Constitution. *See* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 19 (1988) ("[i]n matters of state sovereignty, as

in *Chadha*, political waiver of a constitutional limit on governmental power should not bar vigorous judicial review"). If the states and/or Congress wish to expand the power of Congress, they can do so by amending the Constitution in accordance with Article V. There is no basis for the claim that an expansion of Congressional power can occur by simple "consent."[2]

The Commerce Clause does not authorize federal mandates to the states. The Framers rejected the notion of giving Congress power to mandate the states to exercise their sovereign powers to carry out a federal policy. This Court has never held that Congress has such power. The Act is beyond the enumerated powers of Congress and, therefore, unconstitutional.

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[2] Moreover, Respondents', Intervenors' and their *Amici's* position that Congressional power can be expanded by informal agreements of the states would involve the federal courts in endless adjudication over the issue of the quality and scope of such "consent". Respondents, Intervenors and some of their *Amici* base their consent argument on the unanimous vote of Congress and the alleged consent of the states to the Act. Respondents Br. 8-10; 37-38; Intervenors Br. at 17-19; Compacts Br. 23-27. This analysis raises a number of troubling problems.

Can Congressional power only be expanded by "unanimous agreement"? What if one state or Congressman had opposed the Act or if the Act had passed by a mere one vote margin in both Houses of Congress? It follows from Respondents', Intervenors' and their *Amici's* argument that the Act would somehow be less "constitutional" if these events had occurred. This approach would have the federal courts making determinations as to whether or not the quality and scope of the "consent" given by the states and the vote margin in Congress were sufficient to justify the intrusive legislation in question.

It is not the proper role of the federal courts to conduct such inquiries. The proper inquiry for the federal courts should be limited to whether or not the legislation in question was within the enumerated powers of Congress and whether such power was properly exercised. *See* Laurence H. Tribe, *American Constitutional Law*, §5-2 at 298-300 (2d ed. 1988).

II.

THE ACT IS DESTRUCTIVE OF THE CONSTITUTIONAL STRUCTURE OF FEDERALISM.

A. *The Act impermissibly limits state sovereignty.*

Respondents, Intervenors and their *Amici* make the curious argument that the Act is protective of state sovereignty. Much is made of the "numerous" options open to the states as to how to comply with the Act's mandate. Respondents Br. 17, 34-38; Intervenors Br. 12-15; Compacts Br. 14; Generators Br. 21-25; AFL-CIO Br. 23-25. Respondents, Intervenors and their *Amici* argue that there is no impingement on state sovereignty because of these numerous options.[1]

The Act, however, deprives the states of many options which should be available to a sovereign state with reserved powers. For example, the states are deprived of the option of devoting their monetary, legislative, executive and judicial resources to issues chosen by the state. The Act infringes on the states' sovereignty by requiring that states devote resources according to federal priorities as opposed to state priorities. *See* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 61-62 (1988); *Maryland v. Environmental Protection Agency*, 530 F.2d 215, 225 (4th Cir. 1975),

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[1] Respondents, Intervenors and their *Amici* cite *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) (hereinafter *"FERC"*) for the proposition that this Court should balance the alleged minimal intrusion of the Act against the important federal interests served. The so-called "balancing" approach of *FERC* is inapplicable to the Act. This Court's ruling in *FERC* was based in large part on the fact that the act in question gave the states the *option* to regulate or not to regulate public utilities. Only if the states chose to regulate such utilities did they have to comply with the federal requirements. *FERC*, 456 U.S. at 769 n. 32. The Act, in contrast, leaves the states with no such option. The Act is therefore not merely intrusive on, but it is destructive of, state sovereignty. The federal interest asserted cannot "outbalance" the destructive nature of the Act.

vacated and remanded for consideration of mootness, 431 U.S. 99 (1977).

Another option the states cannot exercise is requiring the generators of low-level radioactive waste to be responsible for disposal of such waste. As Senator Hart stated in support of the "take title" provision: "[w]e were concerned . . . that a state may choose to 'manage' its waste by telling the waste generators that they have to develop a means of storage for their waste." 131 Cong. Rec. S. 18,104 (daily ed. December 19, 1985). Congress deprived the states of the option to exercise their police powers to require those directly responsible for creating a public health and environmental nuisance to remediate such nuisance.

Finally, Congress, by setting a specific schedule for compliance with its mandate, has severely limited the state options in dealing with the issue of low-level radioactive waste. A state might reasonably decide to pursue a program of promoting and developing new and innovative technologies which would reduce the production of low-level radioactive waste and/or safely provide for its disposal. Such a "technology forcing" program might take longer to develop than January 1, 1996. Short-term interim storage at the site of the generation of low-level radioactive waste would be a reasonable option while these new technologies were being developed. The Act, however, constitutes a decision by Congress that the states cannot pursue such an option.

B. *Less intrusive and constitutionally permissible means are available to Congress.*

Respondents, Intervenors and their *Amici* also assert that the Act is less intrusive on state sovereignty than the only allegedly available alternative — a siting program conducted by the national government. *See* Respondents Br. 37-38; Intervenors Br. 10-11; AFL-CIO Br. 26; Compact Br. 15-16.

This analysis is wrong. There are a number of far less intrusive means which have already passed constitutional muster which Congress could still choose to promote the development by the states of low-level radioactive waste disposal facilities. For example, Congress could pass legislation which would provide that either each state develop or contract for disposal capacity or else the national government will develop such capacity. A similar approach has been followed with respect to the issues of clean air and regulation of public utilities. *See, e.g., Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982). Congress could include in this legislation a measure giving states which develop such capacity the power to exclude out-of-state waste.

Congress could also enact a program of conditional grants to states which develop their own programs to dispose of low-level radioactive waste. *See, e.g., Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989) *cert. denied*, 493 U.S. 1070 (1990) (conditional grant of federal highway funds if 55-mile-per-hour speed limit enforced). Once again, Congress could include in this legislation a provision allowing states which develop their own disposal capacity the option of excluding out-of-state waste.

Either of these options would advance the interest of the national government without rendering the states mere departments or agents with respect to low-level radioactive waste. The states would retain the right to decide whether or not to exercise their sovereign power. Thereby the constitutional structure of dual sovereignty would be respected while the interest of the national government would still be advanced.

The Act, in contrast, impermissibly infringes on the states' sovereignty by unnecessarily mandating the exercise of the states'

sovereign powers to carry out a federal policy. The Act should therefore be declared unconstitutional.

III.

THE ACT VIOLATES THE GUARANTEE OF "A REPUBLICAN FORM OF GOVERNMENT".

The mandatory nature of the Act and its sanctions undermine the separate character of the sovereign states and the right of the people of the states to determine the course of their own government with respect to low-level radioactive waste. The Act, therefore, violates the Guarantee Clause of the Constitution, Article IV, Section 4.

While contesting the justiciability of the Guarantee Clause claim,[4] the Respondents, Intervenors and their *Amici* do not contest the fact that the Act interferes with the relationship of the

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[4] The issue of the justiciability of the Guarantee Clause claim is discussed in Allegany County's Brief at 21-23.

Respondents also assert that the State of New York is the only party which can assert a claim based on the Guarantee Clause and that the State of New York has not asserted such a claim. The State of New York has, in fact, specifically relied on the Guarantee Clause in its arguments. *See* New York Br. xi; 23-24. Moreover, the State of New York invited Allegany County as one of its political subdivisions to participate in this action. *See* J.A. at 39a. Therefore, this Court's decision in *New Jersey v. New York*, 345 U.S. 369 (1953) is distinguishable.

Allegany County also has independent standing to maintain this action. To have standing, a party must show that it has sustained, or is in immediate danger of sustaining, some direct injury, and not merely that it suffers in some indefinite way in common with people generally. *See Sierra Club v. Morton*, 405 U.S. 727 (1971). Allegany County has expended human and financial resources against its will because of the Congressional mandate contained in the Act. *See* Allegany County Br. 6 n.5.

Allegany County's status as a political subdivision of New York does not prevent the county from raising Tenth Amendment and Guarantee Clause arguments with respect to an unconstitutional statute that directly harms the county. *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *National League of Cities v. Usery*, 426 U.S. 833 (1976).

people of the states and the states governments. Intervenors and and some of their *Amici* admit that the essence of the Act is to compel the states to develop low-level radioactive waste disposal facilities despite "political" opposition. Intervenors Br. 9; Compacts Br. 3; Generators Br. 3; U.S. Ecology, Inc. Br. 12-13. The people of the states who oppose the siting of such low-level radioactive waste facilities are described as suffering from the "not in my backyard" or "NIMBY" syndrome.[5] The purpose of the Act is to force states to develop low-level radioactive waste facilities despite the contrary wishes of many of the people of the states. As noted by *amicus curiae* U.S. Ecology, Inc.:

> Public opposition and political reactions to such controversial projects are too great to overcome without the federal mandate and protection afforded by the 1985 Amendments.

U.S. Ecology, Inc. Br. 13-14.

If the states were forced by the national government to exercise their sovereign powers contrary to the wishes of the people of the states, then the states would no longer have a form of government which is republican in nature. Instead, the form of government of the states would be reduced to one which is "administrative" in nature; no longer answerable to the people of the states but to the legislature of the national government. Such a result is contrary to the guarantee of a republican form of government to the states.

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[5] Respondents, Intervenors and their *Amici* are inconsistent in their discussions of the hazards of large scale low-level radioactive waste disposal facilities. They dismiss in an off-hand manner the concerns of the people of the states who oppose further development of large scale low-level radioactive waste disposal facilities. Yet, the Respondents, Intervenors and one of their *Amici* point to the safety and health concerns associated with the three existing facilities in South Carolina, Nevada and Washington in support of their arguments. Respondents Br. 3; Intervenors Br. 3-4; AFL-CIO Br. 6-7.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed and the Low-Level Radioactive Waste Policy Amendments Act of 1985 should be declared unconstitutional.

Dated: March 20, 1992

Respectfully submitted,

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